

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

GEORGE R. MALLARD,)	
)	
Plaintiff,)	
)	
vs.)	NO. CIV-04-1382-T
)	
)	
BOB TOMLINSON, et al.,)	
)	
Defendants.)	

ORDER

Plaintiff, a state prisoner appearing *pro se*, brought this action pursuant to 42 U.S.C. § 1983. He alleged that his constitutional rights were violated by defendants. Pursuant to 28 U.S.C. § 636(b)(1)(B), the matter was referred to United States Magistrate Judge Doyle W. Argo for initial proceedings. On August 3, 2005 the magistrate judge filed a Report and Recommendation [Doc. No. 21] in which he recommended that the action be dismissed without prejudice because plaintiff failed to exhaust his administrative remedies on all claims asserted in the complaint. He also recommended that the defendants' alternative motion for summary judgment be denied as moot.

In the Report and Recommendation, the magistrate judge advised plaintiff of his right to object to the findings and conclusions set forth therein, and scheduled an August 23, 2005 deadline for filing such objections. He also advised plaintiff that his failure to object would constitute a waiver of his right to appellate review of the factual and legal issues addressed in the Report and Recommendation.

The Report and Recommendation also expressly recommended that, if the court adopted the

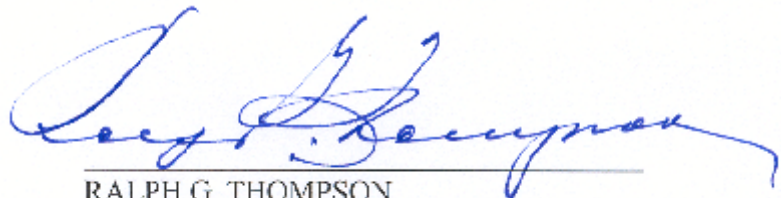
Report and Recommendation after consideration of any objections filed by plaintiff, plaintiff should be allowed to file an amended complaint asserting only those claims on which he has exhausted his administrative remedies. The magistrate judge also recommended that, if plaintiff filed an amended complaint within 20 days of an order adopting the Report and Recommendation, plaintiff should be allowed to pursue this action as to the exhausted claims.

On August 16, 2005 plaintiff filed an amended complaint in which he states that he is pursuing only the exhausted claims. His amended complaint acknowledges the findings in the Report and Recommendation regarding the necessity of exhausting administrative remedies¹.

Having reviewed the Report and Recommendation, the court agrees with the magistrate judge that plaintiff did not fully exhaust his administrative remedies with regard to all claims he asserted in the original complaint. Therefore, the Report and Recommendation [Doc. No. 21] is adopted.

Plaintiff's amended complaint will be again referred to the magistrate judge for initial review.

IT IS SO ORDERED this 22nd day of August, 2005.



RALPH G. THOMPSON
UNITED STATES DISTRICT JUDGE

¹It appears that plaintiff interpreted the Report and Recommendation as requiring him to file an amended complaint prior to receiving this court's order regarding the Report and Recommendation instead of 20 days following such order. In any event, plaintiff acknowledges the need to exhaust administrative remedies and has elected to proceed accordingly.